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**1. CV58747                      Roger C. Johnson v. Randy M. Gratzner, et al.**

Motion Hearing:      Motion for Assignment Order  
Moving Party:      Plaintiff

**Tentative Ruling:** The Motion is **Granted**.

On August 14, 2015, at the prior hearing on this matter, the Court ordered defendant to file and serve the following documentation: 1. Verification of status of bankruptcy, 2. Proof the judgment was listed as a debt, 3. Evidence that the judgment was granted and 4. Proof that the reopened bankruptcy was served on Attorney Russell. The hearing was continued to September 4, 2015. Thereafter, on August 25, 2015, the Court, on its own motion, determined that the default judgment entered on November 21, 2015 was incorrect, in part, and void in regard to the award of \$100,000.00 punitive damages to plaintiff and against defendant. The Court ordered the punitive damage award be stricken and that an amended default judgment for \$190,179.93 be entered forthwith. Plaintiff was ordered to prepare, serve and submit to the Court a proposed amended default judgment within ten (10) days of the order. Plaintiff has failed to comply with the order.

In compliance with the Court order of August 14, 2015, defendant filed a declaration re bankruptcy with Exhibit "A" showing a discharge of debtor, Case No. 11-37444-D-7 filed on March 12, 2012, Exhibit "B" showing a Motion to Reopen Case to "ad(*sic*) a unlisted creditor" filed on March 27, 2015, Exhibit "C" showing a Bankruptcy Court Order to reopen debtor's Chapter 7 case filed on April 2, 2015, Exhibit "D" showing a verification of master address list filed on March 27, 2015 showing the address of Roger C. Johnson, P.O. Box 1150, MiWuk Village CA 95346 and Exhibit "E" showing a Court order closing case where case has been reopened dated May 6, 2015. The Court has confirmed this information on PACER Case Locator showing the Bankruptcy Case No. 2-11-bk-3744, Chapter 7, was filed on July 15, 2011, a Standard Discharge was handed down on March 12, 2012 and the case was closed on May 6, 2015.

Thus, the debt is \$190,179.93 but there is no evidence that the debt was discharged. Plaintiff argues that even if plaintiff was notified that he was named as a creditor in the "reopened" bankruptcy, the debt is not dischargeable under U.S.C.A. Section 523 because it is a debt obtained by false pretenses or actual fraud. This Court's Judgment of November 21, 2015 states, in pertinent part: "The Court finds in favor of plaintiff on plaintiff's First Cause of Action for

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actual fraud committed knowingly, willfully and with malicious intent, with a conscious disregard for the rights of plaintiff. Plaintiff is not required to file an adversary proceeding in Bankruptcy Court to determine if the debt is dischargeable if, as here, the state court has concurrent jurisdiction to determine whether the debt sounds in fraud and is non-dischargeable [*In re Menk* (9<sup>th</sup> Cir. BAP 1999)] 241 BR 896.]

**2. CV58890                      Steven R. McKee v. Gold Street Corporation, et al.**

Motion Hearing:              Motion for Summary Judgment/Summary Adjudication of Issues  
Moving Party:                Defendant

**Tentative Ruling:** Motion for Summary Judgment is **DENIED**. Motion for Summary Adjudication is **DENIED**.

**Analysis:**

Defendant Gold Street Corporation, dba Seniority Lifecare At Home (“Defendant”), brings this Motion for Summary Judgment or in the alternative Motion for Summary Adjudication of Issues.

**Dependant Adult Abuse Claim**

Defendant asserts that Plaintiff cannot establish this claim because Plaintiff cannot establish vicarious liability. Defendant argues that in order for Plaintiff to prevail on vicarious liability, Plaintiff must be able to allege and prove: “(1) that HOLLY CRISP was an officer, director or managing agent at the time of the abuse, or (2) that an officer, director, or managing agent had advance knowledge of HOLLY CRISP’s unfitness and still employed her with a knowing disregard of the rights or safety of others, or (3) that an officer, director or managing agent authorized the conduct, or (4) that an officer, director or managing agent knew of the wrongful conduct and adopted or approved of it after it occurred.” (Memo of Points and Authorities in Support of Motion, 4:24 – 5:2; Reply, 2:4-19.)

Defendant’s argument mixes up the elements of a claim under Welfare & Institutions Code § 15610.63 and § 15657. CACI 3106 lists the elements of proof necessary for a claim under Welfare & Institutions Code § 15610.63. The jury instruction does not require proof of items 1-4

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referenced in Defendant's moving papers. The Reply at page 2 references the proof required to prevail under W&I §15657. But that section is only applicable on the issue of the enhanced remedies available (See CACI 3107). Even if Defendant could defeat the enhanced remedies claim, doing so would not dispose of an entire cause of action for Elder Abuse and Dependent Adult Civil Protection under W&I § 15610.63.

CACI 3701 applies when tort liability is asserted against a principal, as here, against Seniority (Defendant Gold Street Corporation). If Holly Crisp harmed plaintiff while acting within the scope of her employment with Seniority, then vicarious liability may attach to Seniority.

Defendant states that no officer, director or managing agent had advance knowledge of her (Holly Crisp's) unfitness, specifically her issues with alcoholism, depression or use of prescription medications. (Defendants' Separate Statement of Undisputed Material Facts regarding the First Cause of Action for Defendant Adult Abuse ("DSSOUDMF") #3 in which the Declaration of Ira Uslander ¶¶ 4,5,6,9,10,11,12,13,14 supports Defendant's position that no officer, director or managing agent had advance knowledge of her (Holly Crisp's) unfitness, specifically her issues with alcoholism, depression or use of prescription medications.) Plaintiff disputes this fact. Holly Crisp disclosed to Seniority on her employment application that she had been convicted of driving under the influence. ("PSSOUDMF") Employment Application on 5/03 (Declaration of Lisa Blanco Jimenez, Exhibit A). The fact that Holly Crisp disclosed the DUI at the outset of her employment with Seniority is material to the issue of whether Seniority was then put on notice of Holly's alleged alcoholism or whether, because of a single DUI which occurred almost 10 years prior to the incident of 2/17/13 was only a single factor among many giving rise to Seniority's vicarious liability. It is a triable issue of material fact.

### **Negligence Claim**

One of the issues in the negligence claim is whether Defendant was negligent in hiring HOLLY CRISP given her prior DUI conviction. There are triable issues of fact on whether Defendant did an adequate screening and investigation of this employee before hiring her.

Defendant claims that HOLLY CRISP's action was a superseding act because it was criminal in nature. But case law is clear that an employee's criminal torts may fall within the scope of her employment for purposes of respondeat superior. (*Lisa M v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4<sup>th</sup> 291, 296-297; CACI 3701.)

There is also a triable issue of fact on the existence of and amount of damages suffered by Plaintiff. (Defendants' Separate Statement of Undisputed Material Facts("DSSOUDMF"))

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regarding Plaintiff's Damages, at #76, Defendant states that plaintiff did not seek the services of any health care provider, doctor, psychologist, psychiatrist or otherwise for his alleged emotional distress. Deposition of Steven McKee at 12:48; 13:5-9.) Plaintiff disputes this fact. Plaintiff states that he confided in his friends, family and physical therapist. ("PSSOUDMF") Deposition of Steven McKee at 12:1-13, 10.

However, plaintiff admits at 12: 4 – 14: "Q. Since February 17, 2013 have you gone to any health care provider, doctor, psychologist, psychiatrist, anybody for any emotional distress you claim to have suffered as a result of Holly Crisp's actions? A. Not professionally. Q. Not professionally? A. No one professionally. Q. What do you mean by not profession---? A. Well, no doctor, no one with disability, I guess. I talked to a physical trainer and she gave me some information." Plaintiff does not have to seek medical treatment or seek help from a psychotherapist in order to state a claim for emotional distress.

### **Breach of Contract Claim**

Defendant claims that the breach of contract claim fails for at least two reasons: Defendant did not breach the contract and Plaintiff cannot prove with certainty what his damages are. Defendant's position that it did not breach the agreement is premised on the fact that it did not do any act to breach the contract. But this contention presupposes Defendant is not responsible for the actions of its employee, HOLLY CRISP. However, as indicated above, there is a triable issue of fact on the vicarious liability issue.

Plaintiff does not have to prove the amount of his damages in response to this motion. Rather, he has to show that there is a basis for a jury to award damages. Here Plaintiff alleges that he has suffered emotional distress as a result of the incident with HOLLY CRISP. There is a body of case law that allows for emotional distress damages in the context of a breach of contract claim. Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. (See, e.g., *Burgess v. Superior Court*, *supra*, 2 Cal.4th 1064, [infant injured during childbirth]; *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 167 [misdiagnosed venereal disease and subsequent 897\*897 failure of marriage]; *Katelly v. Wilkinson* (1983) 148 Cal.App.3d 576 [fatal water skiing accident]; *Chelini v. Nieri* (1948) 32 Cal.2d 480 [failure to adequately preserve a corpse].) Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress. (See *Wynn v. Monterey Club* (1980) 111 Cal.App.3d 789, 799-801 [agreement of two gambling clubs to exclude husband's gambling-

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addicted wife from clubs and not to cash her checks]; *Ross v. Forest Laum Memorial Park* (1984) 153 Cal.App.3d 988 [cemetery's agreement to keep burial service private and to protect grave from vandalism]; *Windeler v. Scheers Jewelers* (1970) 8 Cal.App.3d 844, 851-852[bailment for heirloom jewelry where jewelry's great sentimental value was made known to bailee].)

Defendants' Separate Statement of Undisputed Material Facts("DSSOUDMF") regarding Breach of Contract, #70, states that non-medical, in home companion care was provided to Plaintiff pursuant to the written service agreement between August 29, 2012 and October 25, 2013. (Declaration of Julie Boucher, ¶ 21.) Plaintiff disputes this fact. Plaintiff states that Gold Street did not provide adequate services as agreed on February 17, 2013. ("PSSOUDMF") Deposition of Steven McKee at 37:24-28:14 32:9-16; 42; 9-45:24. The deposition segments concern an inter-action between Holly Crisp, Seniority's employee, and the plaintiff regarding whether or not plaintiff would accept Crisp's offer to rub his back. It is unclear based upon the evidence provided whether or not optional back-rubs were included in Ms' Crisp's duties. Regardless, it is a factual issue to be tried.

"...[I]n ruling on a summary judgment motion, 'the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citations] ....' (*Aguilar v. Atlantic Richfield Co.*, supra, 25 Cal.4th at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493; Code Civ. Proc., § 437c, subd. (c).) At the same time, " '[w]hen opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.' [Citation.]" (*Waschek v. Department of Motor Vehicles*, supra, 59 Cal.App.4th at p. 647.) In this case, Annod presents nothing but speculation. "Speculation, however, is not evidence." (*Aguilar v. Atlantic Richfield Co.*, supra, 25 Cal.4th at p. 864.)" (*Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1298-1299.)

Plaintiff's Objections to Defendants' Evidence in Support of Motion for Summary Judgment.

- Objections to the declaration of Ira Uslander:
  1. "It is the usual custom and practice of GOLD STREET to have a background check run of every potential employee through IntelliCorp. Obtaining a California Department of Motor Vehicles printout for every potential employee who may operate a motor vehicle in the course and scope of their employment, to have all potential employees

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submit to fitness testing relative to the position to which they are applying, to contact references and obtain information about a potential employee and their suitability for the position they are applying.”[for]*sic*. (Uslander Decl. ¶ 3).  
The objection is overruled.

2. “The job fitness testing indicated that Holly Crisp was 93% suited, overall for a job as a personal caregiver, that she had good general reasoning skills, that she was a conscientious person, that she was agreeable, compassionate and eager to help, as well as structured and consistent with following health care standards and safety procedures.” (Uslander Decl. ¶ 6). The objection is overruled.

3. “The job fitness testing also indicated that Holly Crisp could handle stress well, that her tendency to underreport counter-productive behaviors was of law(*sic*) concern and that there was little or no concern that Holly Crisp would exhibit aggressive behaviors toward others.” (Uslander Decl. ¶ 6). The objection is overruled.

4. “The job fitness testing indicated that there was little or no concern as to Holly Crisp in the areas of dependability, dishonesty, substance abuse or sexual harassment.” (Uslander Decl. ¶ 6). The objection is overruled.

5. Exhibit C to the Uslander Declaration (“job fitness test results”) The objection is overruled on the ground that Exhibit C is a business record and an exception to the hearsay rule (Evidence Code, § 1270, *et seq.*).

6. “Holly Crisp worked as a personal caregiver between the date of her hiring and February 16, 2013 without any complaints about here(*sic*) performance by consumers/clients or co-workers.” (Uslander Decl., ¶ 11). The objection is overruled.

7. “Until the incident that is the subject of this lawsuit, February 17, 2013, Holly Crisp did not exhibit any behaviors that cause Gold Street to believe that she was depressed, struggled with alcoholism, had any emotional problems or was taking prescription medication that could affect her behavior.” (Uslander Decl., ¶ 12). The objection is overruled.

8. “Holly Crisp’s job performance during the time that she was employed by Gold Street was uneventful and she was able to perform all tasks without problem.” (Uslander Decl.,

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¶ 14). The objection is overruled.

- Objections to the declaration of Julie Boucher:

Objection Nos. 9 through 12 are sustained on the ground that telephone conversations with Amanda Spink, Shelly Prows, Debbie Stark and Jose Solano are hearsay (Evidence Code, § 1200.)

Objection No. 13 to Exhibit A to the Declaration of Julie Boucher (Reference Notes) is overruled on the ground that Exhibit A is a business record and an exception to the hearsay rule (Evidence Code, § 1270, *et seq.*).

**3. CVL59253              Ryan Scheller, et al. v. Scott Smith, et al.**

Motion Hearing:      Petition to Compel Arbitration  
Moving Party:        Plaintiff

**Tentative Ruling:** The Petition to Compel Arbitration is **GRANTED**.